

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GLEN J. TUTHILL &	:	CIVIL ACTION
DEAN M. NIEDOSIK	:	
	:	
v.	:	
	:	
CONSOLIDATED RAIL CORP.	:	NO. 96-6868

MEMORANDUM and ORDER

Norma L. Shapiro, J.

June 16, 1998

Plaintiffs Glenn Tuthill ("Tuthill") and Dean Niedosik ("Niedosik"), alleging violations of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, et seq., Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-3(a), and the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Cons. Stat. Ann § 955, filed this action against Consolidated Rail Corporation ("Conrail"). The court granted Conrail's motion to dismiss plaintiffs' claims under FELA and the PHRA and granted summary judgment in favor of Conrail on the remaining Title VII claims. Plaintiffs' appealed the grant of summary judgment; the Court of Appeals affirmed that decision. Conrail has filed a petition for attorney's fees as a prevailing defendant. For the reasons stated below, Conrail's petition will be denied.

BACKGROUND

Plaintiffs were employed in Conrail's Special Audit Group (the "Group") investigating allegations of criminal wrongdoing at Conrail. Kathleen C. Wood ("Wood"), the only female special

auditor in the Group, filed a complaint in October, 1995, with Conrail's Human Resource Department. Wood alleged her supervisors, Thomas Brophy ("Brophy"), a manager in the Group, and Alexander Jacoski ("Jacoski"), the director of the Group, created a sexually hostile working environment. Conrail hired Mark Blondman, Esq. ("Blondman") and Margaret McCausland, Esq. ("McCausland"), from the law firm of Blank, Rome, Comisky & McCauley ("Blank, Rome"), to conduct an internal investigation into the allegations. Conrail's Chief Executive Officer, David LeVan ("LeVan"), instructed all employees to cooperate with Blank, Rome's investigation.

Blondman interviewed Tuthill and Nidosik regarding Brophy's and Jacoski's actions. In January, 1996, the investigators delivered to Conrail a confidential investigative report critical of the Group's handling of sexual harassment issues (the "Report"). Brophy, Jacoski and Thomas Bera ("Bera"), Assistant Vice President of the Audit Department, drafted a rebuttal to the Report. In the rebuttal, the Conrail officials claimed Tuthill and Nidosik were "malcontents."

Nidosik and Tuthill received performance reviews by Jacoski and Brophy within one week after the rebuttal was issued and two months earlier than scheduled. Tuthill and Nidosik each believed their performance scores were unfairly low in retaliation for their participation in the Wood investigation.

Tuthill and Nidosik also objected to a "hostile working environment" following their participation in the investigation. They alleged their supervisors treated them rudely and their co-workers ignored them, although the atmosphere of the Group remained businesslike and professional and both were able to carry out their jobs satisfactorily.

Tuthill and Nidosik alleged they were emotionally damaged by the negative evaluations and hostile working environment. Each plaintiff was examined by Conrail Medical Department Counselor Veronica Neary ("Neary"). Neary recommended each plaintiff seek outside psychological help for emotional support. Because of their emotional conditions, Conrail gave each plaintiff a five month leave of absence with full pay and benefits beginning in February, 1996.

Upon returning to work in July, 1996, Tuthill and Nidosik felt the staff was no longer "buddy-buddy." They did not claim management mistreated them or threatened to terminate their jobs. Tuthill continued working for the Group; Nidosik accepted a higher-paying position in the Intermodal Operations Department. Jacoski and Brophy accepted voluntary separation packages from Conrail as of May 1, 1997.

Tuthill and Nidosik claimed Conrail violated FELA by ostracizing them after their participation in the Wood investigation and caused them to become "permanently emotionally

scarred." Conrail moved to dismiss the FELA claims on the ground that plaintiffs failed to show that Conrail was negligent in placing them within the zone of danger of physical impact. See Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 555-56 (1994). The court dismissed the FELA claims on that basis. See March 14, 1997 Order.

Plaintiffs also claimed Conrail violated the PHRA by unlawfully retaliating against them for participation in a protected investigation. Conrail moved to dismiss plaintiffs' PHRA claims for lack of exhaustion of available administrative remedies. Plaintiffs did cross-file their PHRA claim on May 10, 1996 when they filed their Title VII claim with the Equal Employment Opportunity Commission ("EEOC"). The PHRA mandates that the Pennsylvania Human Relations Commission ("PHRC") has exclusive jurisdiction over PHRA claims for one year from the date of filing. See 43 Pa. Cons. Stat. Ann. § 962(c)(1). However, plaintiffs filed this action in October, 1996, only five months after filing the PHRA charge. This court dismissed plaintiffs' PHRA claims for failure to exhaust the exclusive PHRC remedies. See March 14, 1997 Order.

Plaintiffs claimed Conrail violated Title VII by impermissibly retaliating against them for their participation in

the Wood investigation.<sup>1</sup> At the close of discovery, Conrail, alleging plaintiffs failed to allege participation in any investigation protected under Title VII, moved for summary judgment. Plaintiffs conceded they had not stated a claim under Title VII's "opposition clause." The court held that participating in an internal Conrail investigation of sexual harassment was not protected by Title VII's "participation clause"; that clause contemplates participation in some form of EEOC investigation and proceeding. See Tuthill v. Consolidated Rail Corp., No. 96-6868, 1997 WL 560603 (E.D. Pa. Aug. 26, 1997).

Plaintiffs appealed the court's grant of summary judgment. By Memorandum Opinion entered May 28, 1998, the Court of Appeals affirmed. Conrail, as a prevailing defendant, now seeks to recover reasonable attorney's fees and costs.

### **DISCUSSION**

#### **I. Standard for Prevailing Defendants**

Under Title VII, a prevailing party is entitled to recover reasonable attorney's fees and costs. "In any action or

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<sup>1</sup> Title VII provides:

It shall be an unlawful employment practice for an employer ... to discriminate against any individual ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a).

proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs ...." 42 U.S.C. § 2000e-5(k).

Plaintiffs' claims for compensatory damages were based on 42 U.S.C. § 1981a.<sup>2</sup> A party prevailing on a § 1981a claim is entitled to recover reasonable attorney's fees under 42 U.S.C. § 1988.<sup>3</sup> The legal standard for recovery of attorney's fees is the same under both Title VII and § 1988. See Brown v. Borough of Chambersburg, 903 F.2d 274, 277 n.1 (3d Cir. 1990); Mastrippolito and Sons, Inc. v. Joseph, 692 F.2d 1384, 1387 (3d Cir. 1982).

Because of the important role of private lawsuits in furthering Title VII's purpose of eradicating discrimination, "the encouragement to pursue one's rights provided by a liberally administered attorney's fee provision is crucial to Title VII's effective operation." Kutska v. California State College, 564

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<sup>2</sup> 42 U.S.C. § 1981a provides that in an action to redress a violation of 42 U.S.C. § 2000e, "the complaining party may recover compensatory and punitive damages."

<sup>3</sup> 42 U.S.C. § 1988(b) provides:

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, title VI of the Civil Rights Act of 1964, or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs ....

F.2d 108, 110 (3d Cir. 1977). It is common to award fees to a prevailing plaintiff because plaintiffs are "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority,'" and an award of fees to a prevailing plaintiff is "against a violator of federal law." Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 418 (1978).

Prevailing defendants are treated differently under the statute. "A prevailing defendant seeking an attorney's fee award does not appear before the court cloaked in a mantle of public interest." United States Steel Corp. v. United States, 519 F.2d 359, 364 (3d Cir. 1975). A stricter standard applies in awarding prevailing defendants fees because defendants are not "vindicating an important public policy" and need no encouragement to defend actions against themselves. EEOC v. L.B. Foster Co., 123 F.3d 746, 750 (3d Cir. 1997), cert. denied, 118 S. Ct. 1163 (1998); see Dorn's Trans., Inc. v. Teamsters Pension Trust Fund, 799 F.2d 45, 49 (3d Cir. 1986). Routinely awarding attorney's fees to a prevailing defendant would defeat the goal of zealous enforcement of Title VII, "discourage suits in all but the clearest cases, and inhibit advocacy on undecided issues." Kutska, 564 F.2d at 110.

In enacting Title VII, Congress wanted to shield defendants from "burdensome litigation having no legal or factual basis." Christiansburg Garment Co., 434 U.S. at 420. Fees can be awarded

to a prevailing defendant when the plaintiff's action was frivolous. See Huck v. Dawson, 106 F.3d 45, 51 (3d Cir. 1997), cert. denied, 117 S. Ct. 2458 (1997). "[A] plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." Christiansburg Garment Co., 434 U.S. at 422; see Burks v. City of Phila., 974 F. Supp. 475, 489 (E.D. Pa. 1997).

To justify an award of fees to a prevailing defendant, the plaintiff's action must have been "meritless in the sense that it is groundless or without foundation." Hughes, 449 U.S. at 14. A prevailing defendant must show that plaintiff filed the action for "vexatiousness, bad faith, abusive conduct, or an attempt to harass or embarrass." Kutska, 564 F.2d at 111; see Hensley v. Eckerhart, 461 U.S. 424, 429 n.2 (1983). Subjective bad faith is not required. See Christiansburg Garment Co., 434 U.S. at 421; Pennsylvania v. Flaherty, 40 F.3d 57, 60 (3d Cir. 1994).

In determining whether a prevailing Title VII defendant is entitled to fees, a court should consider: 1) whether the plaintiff established a prima facie case; 2) whether the defendant offered to settle; and 3) whether the trial court dismissed the case prior to trial or the defendant succeeded at trial. These factors are guidelines, not rigid rules. See Foster, 123 F.3d at 751. "Determinations of frivolity are to be

made on a case-by-case basis." Id.; see Sullivan v. School Bd., 773 F.2d 1182, 1189 (11th Cir. 1985). In applying these factors, the court may not "engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." Christiansburg Garment Co., 434 U.S. at 421-22.

Actions decided in defendants' favor on motions for summary judgment have been found frivolous. See Foster, 123 F.3d at 751. However, the grant of summary judgment in defendant's favor does not necessarily mean the action was frivolous for awarding attorney's fees. Even where the plaintiff had nothing more than a "shadow of evidence" and summary judgment was clearly warranted in favor of defendant, plaintiff's action was not necessarily frivolous or unreasonable. Burks, 974 F. Supp. at 490.

"[E]ven if the law or the facts are somewhat questionable or unfavorable at the outset of litigation, a party may have an entirely reasonable ground for bringing suit." Hughes, 449 U.S. at 15. As long as the plaintiffs had "some basis" for bringing their claims, the action was not frivolous under Title VII. See Foster, 123 F.3d at 752. Where the Court of Appeals has not yet ruled on a particular issue, generally it is not frivolous to argue against the position adopted by courts in other circuits. See Christiansburg Garment Co., 434 U.S. at 423; Foster, 123 F.3d at 756. When claims have been disposed of by a motion for

summary judgment after "careful consideration" by the court, the action most likely was not frivolous or vexatious. Hughes, 449 U.S. at 15-16 & n.13.

## **II. Title VII Requirements**

To establish a prima facie case of retaliation under the "participation clause," plaintiffs had to show: 1) participation in a protected activity; 2) adverse employment action after participating in the protected activity; and 3) a causal link between the protected activity and the adverse employment action. See Quiroga v. Hasbro, Inc., 934 F.2d 497, 501 (3d Cir. 1991), cert. denied, 502 U.S. 940 (1991); Jalil v. Avdel Corp., 873 F.2d 701, 708 (3d Cir. 1989), cert. denied, 493 U.S. 1023 (1990).

The court granted summary judgment in favor of Conrail because plaintiffs failed to allege participation in any activity protected under Title VII. Plaintiffs argued that an internal Conrail investigation of sexual harassment was an investigation protected under Title VII, because filing an internal complaint or grievance is protected activity under Title VII's "opposition clause," see, e.g., Datis v. Office of the Attorney General, No. 96-6969, 1998 WL 42267, at \*7 (E.D. Pa. Jan. 16, 1998), so participating in an internal investigation should be protected under the "participation clause." Plaintiffs correctly argued that, while the "participation clause" covered a narrower range of activities, it gave those activities stronger protection than

the "opposition clause." See Tuthill, 1998 WL 560603, at \*3.

The Court of Appeals had not yet addressed whether participation in an internal investigation was an investigation covered by Title VII. This court held that "the investigation, proceeding or hearing must fall within the confines of the procedures set forth in Title VII." Id. The court, determining an internal investigation did not fall within the narrow range of activities covered under the "participation clause," id. at \*4, granted summary judgment. This court gave careful consideration to plaintiffs' arguments on an issue the Court of Appeals had not yet addressed; plaintiffs' argument that the internal investigation was covered under Title VII was not frivolous or vexatious. See Christiansburg Garment Co., 434 U.S. at 423; Foster, 123 F.3d at 756.

In the summary judgment Memorandum and Order, the court did not address whether plaintiffs had established the second and third elements of a prima facie retaliation case. See Tuthill, 1998 WL 560603, at \*4 ("[T]he causal connection between the activity and the alleged adverse action need not be analyzed."). Plaintiffs had evidence that, after they participated in the Wood investigation, Conrail officials informed their superiors that they were "malcontents" and gave them negative evaluations. Plaintiffs also alleged their superiors and co-workers acted rudely toward them and created a hostile work environment.

Plaintiffs claimed these changes occurred shortly after they gave statements in the Wood investigation. While plaintiffs' evidence may have been weak and might have been discredited by the finder of fact, they arguably satisfied the other elements of a prima facie Title VII retaliation claim. Looking at the totality of plaintiffs' Title VII claims, although ultimately unsuccessful at the summary judgment stage, the court cannot say that the claims were frivolous or so baseless they should be required to reimburse Conrail's attorney's fees.

### **III. Section 1981a Compensatory Damages**

Conrail argues plaintiffs' claims under § 1981a for compensatory damages for emotional distress were outlandish and unsupported by record evidence. Plaintiffs produced evidence that both took about five months leave for emotional distress at the recommendation of a Conrail medical counselor. There was evidence that plaintiffs suffered a variety of physical ailments, such as ulcers and colitis, allegedly as a result of their treatment at work following the Wood investigation. Conrail argued that both plaintiffs were former police officers who had endured physical alterations and far more intense psychological abuse than they received while working in the Group. Conrail also argued that Tuthill was sufficiently emotionally stable to take an eight-day trip to Cortona, Italy for skiing in the Alps and another eight-day trip to Costa Rica. While plaintiffs'

testimony of severe emotional distress from their working conditions might well have been rejected at trial, plaintiffs' claim for compensatory damages, though far-fetched, was not sufficiently baseless or frivolous to taint their claims as a whole.

#### **IV. Costs**

Conrail seeks a total award of \$7,837.73 for costs. Conrail seeks \$6,400.31 for court reporter fees for deposition transcripts for twenty-one depositions. Deposition transcription costs are recoverable when "necessarily obtained for use in the case." 28 U.S.C. § 1920(2). Plaintiffs object to the depositions of Shelly Goodman (\$485.55), Harold V. Kulman (\$362.25) and John G. Trzesniowski (\$208.50), plaintiffs' experts, because they provided expert reports and office notes during the discovery period. Conrail was entitled to take these depositions under the Federal Rules of Civil Procedure; it was appropriate trial preparation and the costs are recoverable.

Plaintiffs also object to Conrail's request for \$2,772.40 for deposing them over a span of five days. Conrail spent approximately fifteen hours deposing Tuthill on three days and almost eight hours deposing Nidosik on two days. Plaintiffs claim the depositions were too lengthy and the time should be reduced. However, plaintiffs do not allege Conrail wasted time asking irrelevant or improper questions. Conrail will be awarded

\$2,772.40 for the Tuthill and Niedosik depositions. Plaintiffs do not challenge the additional \$2,571.61 Conrail incurred in transcription expenses.

Conrail seeks to recover \$661.08 in photocopying costs. Costs for exemplification and copying of papers necessary to a party's case can be recovered. See 28 U.S.C. § 1920(4). Conrail requests reimbursement at 12¢ per page for three sets of twelve different briefs, pleadings and document productions. Plaintiffs do not object to reimbursement for three complete sets of these documents; they only object to Conrail's request for complete reimbursement for its 103 page motion to dismiss the Complaint with supporting materials (\$37.08) and Conrail's 105 page motion to dismiss the Amended Complaint (\$37.80). Plaintiffs argue Conrail is only entitled to recover 50% of those costs, because both motions were denied in part. Conrail was the prevailing party and is entitled to its costs without apportionment. Plaintiffs do not object to the remaining \$623.64 in copying costs.

Finally, Conrail petitions for witness fees of \$361.34 under 28 U.S.C. § 1920(3) for the production of witnesses at depositions. Plaintiffs object to the \$232.28 witness fees of their own experts. These depositions were appropriate trial preparation and the witness fees are recoverable.

Plaintiffs object to \$119.06 in witness fees for Russell

Gross ("Gross") and Geraldine Kenton ("Kenton"). Apparently neither witness appeared or offered testimony. Conrail has not explained why it should be reimbursed for fees to individuals who never testified, or why their presence was required; the fees of \$119.06 will be deducted. Plaintiffs do not object to the \$10.00 fee paid to Monmouth Medical Group.

Conrail requests \$415.00 for service of process costs for the witnesses to whom witness fees were paid, but Conrail cannot recover fees paid for service on Gross and Kenton. Conrail has not specified what service of process fees it paid for each witness and the court cannot ascertain from Conrail's petition what service of process costs were incurred for Gross and Kenton. Because of Conrail's lack of specificity, the court would be justified in excluding all process serving costs. However, plaintiffs state they are willing to pay \$70.00 in service of process costs; the court will award Conrail that amount.

#### **CONCLUSION**

Prevailing defendants are entitled to an award of attorney's fees under Title VII and § 1988 under rare circumstances not present in this case. While plaintiffs ultimately were unsuccessful in their claims, the court gave careful consideration to their claims prior to granting summary judgment in Conrail's favor. Conrail will not be awarded reasonable attorney's fees for defending this action. Conrail will be

awarded \$7,373.67 in costs.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GLEN J. TUTHILL &	:	CIVIL ACTION
DEAN M. NIEDOSIK	:	
	:	
v.	:	
	:	
CONSOLIDATED RAIL CORP.	:	NO. 96-6868

ORDER

AND NOW, this 16th day of June, 1998, upon consideration of defendant Consolidated Rail Corporation's ("Conrail") motion for attorney's fees and costs, plaintiffs' response thereto, Conrail's petition for costs and plaintiffs' response thereto, and in accordance with the attached Memorandum, it is hereby **ORDERED** that:

1. Conrail's motion for attorney's fees and costs is **DENIED**.
2. Conrail's petition for costs is **GRANTED IN PART AND DENIED IN PART**.
3. Conrail is awarded **\$7,373.67** in costs against plaintiffs.

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Norma L. Shapiro, J.